UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES SAN FRANCISCO BRANCH OFFICE

SMURFIT-STONE CONTAINER ENTERPRISES.

and

Cases 32-CA-24480 32-CA-24725

TEAMSTERS DISTRICT COUNCIL NO. 2, LOCAL 388-M, affiliated with INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Gary M. Connaughton, Esq. Oakland, CA, for the General Counsel.

Lawrence H. Stone, Esq. (Jackson Lewis) of Los Angeles, CA, and Robert J. Scheer, Labor Relations Counsel for the Respondent.

David Grabhorn, Vice President, (Teamsters Disctrict Council No. 2) of Fullerton, CA, for the Union.

DECISION

Statement of the Case

Jay R. Pollack, Administrative Law Judge. I heard this case in trial at Oakland, California, on January 14, 2010. On April 20, 2009, District Council No.2, Local No.388-M, affiliated with the International Brotherhood of Teamsters (the Union) filed the charge in Case 32-CA-24480 against Smurfit-Stone Container Enterprises, Inc. (Respondent). On September 16, 2009, the Union filed the charge in Case 32-CA-24725. On October 29, 2009, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing against Respondent, alleging that Respondent violated Section 8(a)(5) and (1) of the Act. Respondent filed a timely answer to the complaint, denying all wrongdoing.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the posthearing briefs of the parties, I make the following:

Findings of Fact

I. Jurisdiction

The Respondent is a Delaware corporation with an office and principal place of business in Fresno, California, where it has been engaged in the manufacture and non-retail distribution of corrugated boxes. In the twelve months prior to issuance of the complaint, Respondent, in conducting its business operations, sold and shipped goods valued in excess of \$50,00 directly to customers who themselves meet one of the Board's jurisdictional standards, other than the indirect inflow or indirect outflow standards. Accordingly, Respondent admits, and I find that, 10 Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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The Respondent admits, and I find that, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

Respondent was engaged in the manufacture and non-retail distribution of corrugated boxes at its Fresno, California, facility. The Union has represented production and maintenance employees at this facility for many years. The most recent collective bargaining agreement between the parties was effective by its terms from March 1, 2005 to February 28, 2011. As of September 28, 2008, Respondent employed 92 employees in the bargaining unit.

On September 25, 2008, Respondent notified the Union that it intended to cease production and lay off all bargaining unit employees commencing on or after November 28, 2008. Between September 26, 2008 and May 4, 2009, the Union and Respondent engaged in bargaining over the effects of Respondent's decision to permanently close its facility and lay off bargaining unit employees. At the first bargaining session, on September 26, 2008, Respondent informed the Union that October 2009 was the target date for closing of the plant and laying off all employees. At the second bargaining session, on November 21, 2008, Respondent informed the Union that, although October 2009 was still the closing date, some bargaining unit employees might continue to work in the warehouse beyond that date.

The parties met on six occasions: September 26, November 21, and December 10 2008, and January 6, March 24 and April 1, 2009. As background, the parties had negotiated a closure agreement for Respondent's San Jose facility in 2004. That closure agreement featured four fundamental concepts: (1) the collective bargaining agreement would terminate before its actual termination date; (2) seniority would be suspended in exchange for; (3) Respondent would provide severance pay for employees; and (4) Respondent would continue medical benefits for employees. The provision providing for early termination of the contract stated:

The Current Collective Bargaining Agreement dated June 16, 1998-June 15, 2004 between the parties shall remain in full force and effect under terms of this Termination Agreement until all operations cease and the Plant closes or no bargaining unit employee remains, whichever is later at which time the Collective Bargaining Agreement will be considered null and void at this facility.

In the March 2005 collective-bargaining agreement for the Fresno facility, the Union sought a formula for severance pay. Respondent rejected that proposal. Instead, Respondent recognized "the right of the Union to discuss severance pay in case of permanent plant closing for economic reasons and not for reasons such as labor disputes, Acts of God, War, etc." The parties agreed that Respondent would "bargain a severance/impact bargaining formula that is not inconsistent with its severance/impact bargaining agreement at San Jose (January 2003)."

Throughout the bargaining sessions regarding closure of the Fresno facility, Respondent proposed that the current bargaining agreement terminate if, and when the unit was reduced to a certain number of employees. Respondent originally proposed that the bargaining agreement terminate if, and when the number of employees reached five. Respondent later reduced that number to three and, finally to one (1) or fewer in its last offer of April 1, 2009. The Union maintained that it would not agree to terminate the bargaining agreement while any employees were still employed at the facility. Respondent, through its spokesman, indicated that there would be no severance agreement without early termination of the contract.

At the first bargaining session, held on September 26, 2008, Respondent proposed that seniority be suspended effective the date of the supplemental agreement. It also proposed a severance formula, consistent with the San Jose Agreement, of one week for each full year of service. Respondent proposed continuance of medical benefits for four months and then COBRA continuation. Finally, Respondent proposed early termination of the collective bargaining agreement if, and when the remaining bargaining unit employees numbered five (5) or fewer. Respondent made it clear that the number of employees required to effect termination of the bargaining agreement was variable and subject to improvement.

On November 21, 2008, The Union made its proposal which called for the following: two weeks of severance pay for each year of service, four additional months of payments of health insurance, and the continuation, rather than suspension of seniority. The Union proposed that the Bargaining Agreement continue until its expiration date. Respondent changed its proposed closing date to January 31, 2009.

On December 10, 2008, the parties again bargained over the effects of the plant closure. The Union reduced its demand for severance pay from two weeks to one week for each year of service. The Union announced that it would not agree to early termination of the bargaining agreement, and that it would file unfair labor practice charges.

On January 6, 2009, Respondent proposed early termination of the bargaining agreement when the number of bargaining unit employees reached three or fewer. Prior to the parties' next meeting, Respondent filed for bankruptcy. On January 23, 2009, the Union proposed that Respondent implement the San Jose closure agreement.

On March 24, 2009, Respondent proposed that "certain warehouse employees, presently four in number, will continue to work. . . but this is not to be misconstrued as a guarantee of either crew size or duration of employment." Respondent proposed that the Bargaining Agreement terminate when the number of unit employees reached three or fewer. Respondent indicated that it was "flexible about the number of employees involved when the workforce is reduced to three employees, but insisted that the current agreement expire while there were still some employees working. "The Union rejected Respondent's proposal.

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The Union asked for Respondent's last, best and final offer on April 1, 2009. On April 1, Respondent presented its last, best and final offer, which included early termination of the contract when the number of bargaining unit employees reached one or fewer. On April 17, the Union sent Respondent a counter proposal, which consisted of Respondent last best and final offer with all the provisions the Union did not accept, lined out, including the early termination proposal. On April 23, Respondent rejected the Union's proposal and again offered its last proposal. On May 5, Respondent withdrew its final proposal. The Union did not request further

bargaining. No further bargaining took place and on September 1, 2009, the Fresno plant was closed and the remaining four employees were laid off.

Within this factual framework, the General Counsel alleges that Respondent unlawfully insisted to impasse on a permissive subject of bargaining. Respondent denies that the parties reached impasse. Further, Respondent argues that the permissive subject of bargaining was inextricably linked to mandatory subjects of bargaining.

III. Analysis and conclusions

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An employer is entitled to close its business purely for economic reasons without having a duty to bargain over the decision under the Act. *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 686 (1981) An employer, however, must provide the union the opportunity to bargain over the "effects" of the decision.

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The General Counsel contends that Respondent insisted to impasse on a permissive subject of bargaining. In order for a subject of bargaining to be considered mandatory, the issue must bare a "direct, significant relationship to . . . terms or conditions of employment," rather than a "remote or incidental relationship." NLRB v. Massachusetts Nurses Association, 557 F.2d 894, 898 (1st Cir. 1977). With respect to mandatory subjects, neither party is legally obligated to yield" but with respect to permissive subjects "each party is free to bargain or not to bargain, and to agree or not to agree." *Borg-Warner Corp.*, 356 U.S. 342, 349 (1958). Accompanying this distinction is the principle that "neither a union nor an employer is permitted to force a bargaining deadlock over the inclusion of a term covering a permissive subject of bargaining." *Inland Tugs, A Div. of American Commercial Barge Line Co. v. NLRB*, 918 F.2d 1299, 1308 (7th Cir. 1990) citing *Borg-Warner Corp.*, 356 U.S. 342 (1958). Insisting upon acceptance of a permissive or non-mandatory subject to the point of impasse constitutes a violation of Section 8(a)(5) and (1) of the Act. *Pleasant view Nursing Home Inc.*, 351 F.3d 747 (6th Cir. 2003).

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Respondent's proposal for early termination of the contract was a permissive subject of bargaining. Respondent sought to modify the existing term of the collective bargaining agreement. The Union did not have to bargain over that proposal and Respondent could not insist to impasse on that subject.

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Respondent contends that the proposal for early termination of the bargaining agreement was inextricably intertwined with, and inseparable from the other proposals in the closing agreement. Under certain circumstances a permissive subject can be as "intertwined with and inseparable from the mandatory terms and conditions. . . as to take on the characteristics of the mandatory subjects themselves." *Sea Bay Manor Home for Adults*, 253 NLRB 739 ,740 (1980) enfd., 685 F.2d 425 (2d Cir. 1982).

In *Dependable Storage Inc*, 328 NLRB 44 (1999), the Judge, with Board approval, found that there was no legal impediment to the linking of mandatory and nonmandatory, or permissive subjects of bargaining, so long as the inclusion of the permissive subject was not a device to circumvent the general rule that one may not insist on such a provision to impasse. ¹ In the instant case, Respondent was offering the continuation of medical benefits and severance pay only on the condition that the Union agrees to early termination of the contract. The early

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¹ The judge cited *Nordstrom, Inc.*, 229 NLRB 601 (1977) and *Torrington Industries*, 307 NLRB 809, 812 (1992).

termination of the collective bargaining agreement was part of a package that included continuation of medical benefits, severance pay, suspension of seniority, and early termination of the contract. Respondent would not grant the benefits if employees retained recall rights. This principle was part-and-parcel of the San Jose closure agreement. At the time the collective bargaining agreement was reached, the parties agreed that Respondent would not act inconsistent with the San Jose agreement, if there was to be a plant closure. In the instant case, early termination of the collective bargaining agreement and suspension of seniority were consideration for severance pay and continued medical benefits. These proposals were part of a package and took on the characteristics of the mandatory subjects. Therefore, I find no violation in Respondent's linking of these proposals.

Should reviewing authority disagree, I next treat the question of impasse. Impasse has been defined as" that point at which the parties have exhausted the prospects of concluding an agreement and further discussion would be fruitless." *Laborers Health and Welfare Trust Fund for Northern Calif. V. Advanced Lightweight Concrete Co.*,484 U.S. 539, 543 (1988). In *Taft Broadcasting Co.*, 163 NLRB 475 (1967), the Board stated:

Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiation, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

Here, the importance of the issue of early termination of the contract would point to impasse. However, Respondent had made concessions on this point. While the Union was taking the position that the parties were at impasse, Respondent did not take such a position. Respondent was always willing to bargain. For impasse to occur, neither side must be willing to compromise. Grin*nell Fire Protection Systems Co.*, 328 NLRB 585, enfd., 236 F.3d 187 (4th Cir. 2000) citing *PCR Recording Co.*, 280 NLRB 615, 640 (1986) enfd. 836 F.2d 289 (7th Cir. 1987). Based on the history of the bargaining, and Respondent's concessions and willingness to bargain, I find impasse had not yet been reached.

Under all of the circumstances, I find that Respondent did not insist to impasse on a nonmandatory subject of bargaining.

Conclusions of Law

- 1. Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.
 - 2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent did not violate Section 8(a)(5) and (1) of the Act within the meaning of Section 2(6) and (7) of the Act.

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On these findings of fact and conclusions of law and on the entire record, I issue the following recommended. 2

ORDER 5 The complaint should be dismissed in its entirety. Dated, Washington, D.C., April 5, 2010. 10 Jay R. Pollack Administrative Law Judge 15 20 25 30 35 40 45

 ² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in
 50 Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.